VHF stations typically have a signal reach of 72 to 76 miles, while UHF stations' signal reach is only 44 miles. TV Ownership Further Notice at ¶ 9. These disparities in signal reach result in similarly gross inequalities in Grade B coverage, with UHF stations typically achieving only between approximately 55 and 75 percent of the Grade B area coverage of VHF stations. See Cohen Statement at 2-3. Meanwhile, a UHF station generally requires ten times the power to broadcast its strongest signal than does a VHF station. TV Ownership Further Notice at ¶ 9. See also Cohen Statement at 4 (a UHF station bears "substantially greater capital expenditures and operating costs" than a VHF station in order "to achieve the maximum potential of the UHF operation which is still not likely to match the reach of the VHF station").

Meanwhile, the Commission has noted that, because more than one-third of TV households do not subscribe to cable -- and because multiple sets frequently are not connected to cable even in subscriber households -- the UHF disparity is not fully ameliorated by cable carriage. TV Ownership Further Notice at ¶ 13. See also Video Competition Report, 13 FCC Rcd at 1049-50. As a general matter, the Commission also has found, UHF stations remain less profitable than VHF stations, which continue to be favored as network affiliates. Id. 9/ Lower profits necessarily translate into lower station prices for UHF outlets.

9/ The Commission also noted that, although the Telecom Act did not directly address the UHF signal disadvantage in connection with its directive to modify the national audience reach cap, the Conference Report accompanying the Act did draw a distinction between UHF and VHF signals in determining whether to modify the local duopoly rule, stating the intent of Congress to permit VHF-VHF local station

The current disparity will continue even with the transition to digital broadcasting. See Cohen Statement at 3. Thus, for example,

> [a]lthough reliable digital television service can be achieved with less signal strength than that required for satisfactory NTSC service, *the differences in propagation affecting UHF service adversely remain.*

Id. (emphasis added). Indeed, VHF NTSC stations that have been assigned a UHF channel for digital service have been allotted higher power levels precisely in recognition of the UHF handicap. Yet, "[a]t the end of the transition period, such a station is likely to return to its VHF channel for digital transmission, thus perpetuating the VHF/UHF disparity." Id.

Ultimately, the Joint Commenters believe that any adjustment of the current UHF discount based on the anticipated conversion to digital broadcasting should be deferred until the end of the conversion process, when analog spectrum will be surrendered and the industry and the FCC will have acquired some real-world experience with digital transmission.

V. CONCLUSION

It is a basic tenet of responsible regulation that any rule must be based on a rational prediction that it will remedy an identified harm. Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 40-42 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). Indeed, if, as a result of changes in market conditions since a regulation was

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combinations "only in compelling circumstances." S. Conf. Rep. 104-230, 104th Cong. 2d Sess 163 (1996).

adopted, it no longer achieves its desired objectives -- or produces results antithetical to those objectives -- it is fully within the Commission's discretion, and, indeed, it is the Commission's public interest obligation, to modify or repeal it. N.A.A.C.P. v. F.C.C., 682 F.2d 993, 1000-01 (D.C. Cir. 1982). This principal is particularly applicable in an industry marked by technological and economic upheaval. As the Supreme Court has observed:

> "Underlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."

United States v. Southwestern Cable Co., 392 U.S. 157, 172-73 (1970) (quoting F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)). Thus, the key issue remains, as it has been each time the Commission has taken up the national multiple ownership rules, not what considerations will justify changes in the rule, but what factors warrant its retention. We respectfully submit that there are none.

The decision to eliminate the cap has already been made: the Commission has recognized repeatedly over the last fourteen years that limitations on national station ownership are arbitrary and unnecessary. The continuing rapid evolution of the video marketplace only confirms the wisdom of the Commission's conclusion in 1984, and mandates that the Commission now complete its unfinished business by eliminating the audience reach cap.

Respectfully submitted,

FOX TELEVISION STATIONS, INC.
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July 21, 1998

ATTACHMENT A

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The Emperor's New Clothes: Regulation without a Rationale

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July 21, 1998

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The Emperor's New Clothes: Regulation without a Rationale

" 'But the Emperor has nothing on at all!' cried a little child."
Hans Christian Anderson

Starting with the first set of national ownership rules in 1940, the FCC has chosen to impose arbitrary limits on the number of stations a group owner could hold. At first, the limit was set solely based on number of stations; initially three (in 1941), then five (1944), then seven, no more than five of which could be VHF (1954), and finally twelve (1985). Beginning in 1985, the Commission incorporated an "audience reach" limitation; that is, a constraint on the number of television households a group owner's stations could cover. In the Telecommunications Act of 1996, Congress eliminated the restrictions on the number of stations a group owner could hold and raised the reach limitation from 25 to 35 percent, subject to FCC review on a biennial basis.

The Commission's national television ownership rules are a classic case of regulation without a discernable rationale — or worse yet, a case of regulation becoming an end in itself. It is time to for the Commission to take the opportunity presented by Congress and declare that the Emperor is naked — that there is no longer (if there ever was) any "there there."

An End in Itself

The stated "rationale" for limiting national ownership has been to "promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."[1] More recently,

1 *See* Rules and Regulations Relating to Multiple Ownership, 18 F.C.C. 288 (1953).

the Commission has apparently added "source diversity" or, in its words, "promoting a variety of program or information producers and owners."[2]

What is disconcerting is not the enunciation of such lofty and laudable goals but the fact that the Commission has never sought to relate the achievement of its ends to the means it has employed. The limits it has imposed at various times have no apparent basis in economic theory. The original caps were arbitrary,[3] and each subsequent adjustment has been equally arbitrary — dictated more by political realities than realities of the marketplace.

Truth be told, the ownership rules seem to be an end in themselves, rather than an instrument coherently conceived to accomplish the stated goal of promoting diversity. As such, it is difficult to comment constructively on the public policy "rationale" for the rules. If the rules are their own rationale, what matter that the number of broadcast stations increases many-fold, or that cable television becomes the economically dominant video provider, or that satellite broadcasting systems with two hundred channels blanket the country or even that Internet broadcasting and interactive TV begin to develop?

We and many others (including the Commission's staff) have on several occasions sought — to little seeming avail — to explain how the sea-change in the economic structure of electronic media has completely obliterated what little basis the multiple ownership rules ever possessed. In our information-surfeited society, who can seriously maintain that Americans have limited access to diverse viewpoints? In reality, there has never been a society with more access to more information about every conceivable thing under (and over) the sun!

This is, of course, not the first time the FCC has considered the matter of restrictions on broadcast ownership. Over the last twenty years, it has repeatedly reconsidered the efficacy of its so-called "multiple ownership rules." Indeed, it has *reconsidered* the rules' efficacy far more

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2 FCC, *In the Matter of 1998 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership rules and Other rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, *Notice of Inquiry*, adopted March 12, 1998, released March 13, 1998 at ¶ 6.

3 Indeed, the limits have had the effect of grandfathering the ownership interests of the primary group owners. The irony is that these limitations, along with the fin/syn rules, actually served to inhibit diversity by deterring the growth of new networks.

carefully than it ever *considered* the rules' efficacy in the first place. In a previous paper,[4] we went back and carefully examined the Commission's original explanations for its imposition of ownership restrictions. We discovered that the Commission has never clearly enunciated the instrumental connection between the specific restraints it has adopted and particular public policy objectives. It has instead referred to a few generalized concerns and various, almost stock clichés (along the lines of "strength in diversity") with virtually no analysis to link its desired outcome with specific characteristics and features of the relevant operating environment.

We noted that the Commission in 1984 had tentatively concluded there was no basis for national ownership rules and had proposed to phase them out over six years.[5] The Commission — properly, in our view — pointed to the growth in the number of broadcast stations as well as the emergence of cable, satellite and other electronic media. Unfortunately, in the face of Congressional pressure, the Commission retreated and decided only to relax the rules (from seven to twelve) and incorporate the audience reach test (25 percent).

As before, there was no apparent considered basis for the new numbers. Why was twelve the right number? What was the relevance of a 25-percent reach limit?[6] Not surprisingly (but somewhat disturbingly) in its decision on reconsideration, the Commission stated: "While *there is no evidence in the record* that would lead us to believe that [a substantial increase in audience base] would necessarily have an adverse result, we now believe that the potential . . . warrants a more cautious approach" (emphasis added).[7]

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4 John Haring and Harry M. Shooshan III, *A Numerator in Search of a Denominator*, prepared for Fox Broadcasting, May 17, 1995. A copy is provided as Attachment A to this paper.

5 *Ibid.* at 9-11.

6 Again the number happened to be consistent with accommodating existing ownership interests. At the time, Metromedia had the largest combined reach at almost 24 percent.

7 See Amendment of Multiple Ownership Rules (General Docket 83-1009) 100 FCC 2d 17 (1984), recon. granted in part 100 FCC 2d 74 (1985).

Misunderstanding the Problem

Not only have the ownership limits been arbitrary, they represent a fundamental misunderstanding of the problem. Part of the "rationale" for ownership limitations is that concentration of ownership may lead to failures of competition with attendant misallocation of resources and adverse redistribution of income. In this regard, we (as well as other economists[8] and the Commission itself, in an earlier apparition) have noted that, where economically legitimate concerns about competitiveness might be raised, standard antitrust enforcement supplies a suitable means to address public policy concerns.[9]

It is a commonplace of economic analysis that any assessment of competition must proceed on the basis of a properly delineated market. This does not necessarily involve a formal legal definition of the relevant market, but it does entail an analysis of basic conditions of supply and demand that are relevant to the particular policy question or issue of interest. Indeed, the meaning of the term "relevant" as in "relevant market" refers to what is economically germane to consideration of a particular question, often the competitive consequences of the merger of two firms.

One of the discomfiting features of the Commission's assessment and regulation of competition conditions in broadcasting is the extent to which they are uninformed by relevant economic considerations. The Commission's analysis of competition is, in economic terms, virtually all form and little substance. Consider the Commission's specification of a national ownership cap and measurement of "concentration" of ownership relative to the "national market."

There is no national market for program distribution. Program distribution occurs in local markets where broadcasters typically compete against many other broadcasters (and cable channels) for viewers' attention. The fact that an enterprise owns stations in several (or even all) individual local markets has no negative competitive import because stations in *different* local markets do not usually compete against one another. Indeed, as we will discuss presently, if multiple station ownership affords the ability to exploit production and transactional economies to a greater extent, more

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[8] Stanley M. Besen and Leland L. Johnson, "Regulation of Broadcast Station Ownership: Evidence and Theory," *Video Media Competition: Regulation, Economics, and Technology,* Eli M. Noam, ed. (New York: Columbia University Press), 1985.

[9] *See, op. cit., A Numerator in Search of a Denominator. See also* John Haring and Harry M. Shooshan III, *The Evolving Electronic Media Marketplace and the Devolving Case for Broadcast Ownership Restrictions*, prepared for Fox Broadcasting, March 20, 1995. A copy is provided as Attachment B to this paper.

extensive multiple ownership is likely to enhance competition by enhancing competitive effectiveness.

The typical broadcast station is but one of a large number of program services competing for viewers' attention in any particular locality. Aggregating locally competitive operations does not create market power; if anything, it makes for greater competitive effectiveness.[10] The fact that one group owner can reach 25, 35 or even 100 percent of television households does not confer market power on that group owner if other stations can (and do) reach the same households.

We have analyzed the local markets in which the two group owners sponsoring these comments own television stations. We find that, on average, there are eleven other commercial broadcast television stations in these markets. The actual distribution is summarized in Table 1 and Figure 1. Complete data are found in the Appendix.

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10 In their scholarly treatise on *Vertical Integration in Cable Television* (The AEI Press/The MIT Press, 1997), Professors David Waterman and Andrew Weiss explain how cable system operators may well be able to exercise monopsony power given their monopoly status in individual local markets and how this power may have more untoward consequences the larger the number of monopoly systems controlled. The key premise of their argument is the cable operator's monopoly status in each local market which affords bargaining power as the "gate-keeper" controlling access to particular localities of viewers and translates into the ability to free-ride on the program expenditures of others. Broadcasters, in contrast, do not possess monopoly power of this kind in the local markets in which they operate. The typical broadcast station is but one of a large number of program services competing for viewers' attention in any particular locality.

Table 1
Stations Licensed to Markets

Market	Stations Licensed to Market (1997)	Market	Stations Licensed to Market (1997)
Owner: Fox		**Owner: USA Broadcasting**	
Atlanta	10	Atlanta	10
Austin, TX	6	Boston	14
Birmingham-Tuscaloosa-Anniston*	11	Chicago	13
Boston	14	Cleveland	12
Chicago	13	Dallas-Ft. Worth	15
Cleveland	12	Houston	14
Dallas-Ft. Worth	15	Los Angeles	18
Denver	12	Miami - Ft. Lauderdale	14
Denver	12	New York	16
Detroit	8	New York	16
Greensboro-High Point-Winston Salem	7	Orlando-Daytona Beach-Melbourne	12
Houston	14	Philadelphia	13
Kansas City	8	Tampa-St Petersburg-Sarasota	12
Los Angeles	18		
Memphis	7		
Milwaukee	9		
New York	16		
Philadelphia	13		
Phoenix	13		
Salt Lake City	7		
St. Louis	7		
Tampa-St Petersburg-Sarasota	12		
Washington, D.C.	11		

Average Stations per Market: 12.06

* SPR combined these three markets, listed separately by BIA, because Nielsen has advised stations that it intends to collapse the Anniston, Birmingham and Tuscaloosa television markets into a single Birmingham DMA effective during the fourth quarter of this year. Also, SPR removed the low-power station K13VC from the list of Fox-owned stations.

Source: Appendix (data provided by BIA Consulting and compiled by SPR).

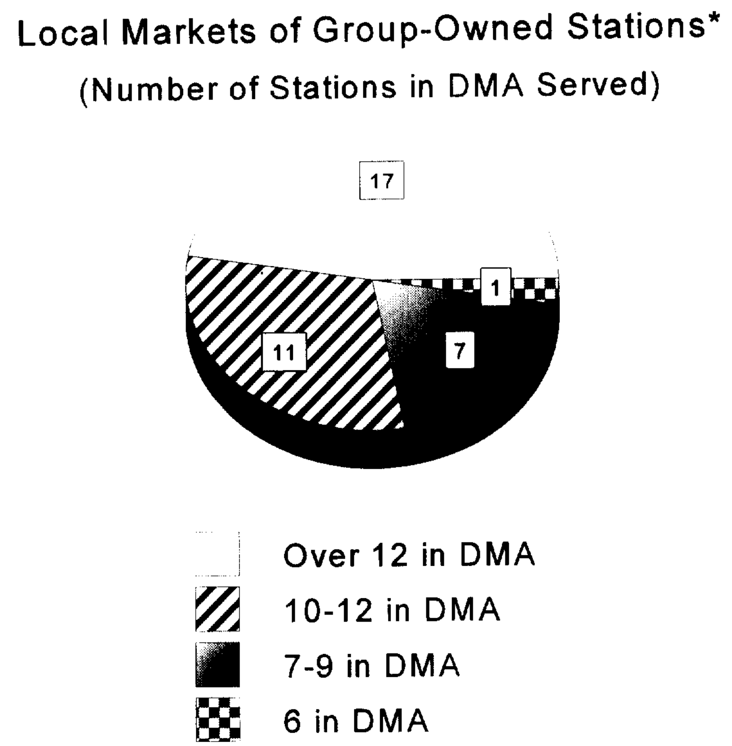

Figure 1: **Data Source: Appendix.**
*** Fox, USA Broadcasting**.

Not only are there ample competing local broadcast outlets, but, as a matter of economics, it is hard to fathom how limitations of the permissible geographic scope of broadcast operations can enhance efficiency. Since assemblage of stations to permit broader geographic coverage does not create market power,[11] limitations on the ability to create such assemblages do not benefit

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[11] Much the same analysis applies to the markets for national advertising and for the sale of syndication rights. In fact, in 1995, the Commission considered these markets as well and found no cause for concern (*Further Notice of Proposed Rule Making*, In the Matter of Review of the Commission's Regulations Governing Television Broadcasting and Television Satellite Stations Review of Policy and Rules, MM Docket Nos. 91-221 and 87-8, adopted December 15, 1994, released January 17, 1995, at ¶¶ 88, 90 and 91):

> [W]e know of no recent analyses which demonstrate that a company owning a group of TV stations across the nation has and uses significant market power to charge higher advertising rates to national or local advertisers. . . . First, the ever growing list of alternative buyers of video programs suggests real limits on the exercise of any such power. Second, we have no evidence that broadcast television stations have monopoly power in their local markets for delivered video programming. Lacking such power, there is little way these stations could exercise market power in the purchase of video programs. . . . Consequently, we are unaware of evidence which suggests that any existing group owned broadcast TV stations exercise market power in the video program production

(continued...)

competition. Since assemblage of stations to permit more effective exploitation of scale economies in program production does enhance efficiency and the delivery of better programming — a consumer benefit — limitations on such assemblages *inhibit* competitive effectiveness.

Misidentifying Diversity

Identifying the problem which the rules are intended to solve is complicated by the fact that the FCC's "rationale" goes beyond merely antitrust analysis. Reduced to its simplest terms, the Commission has, as we have noted, sought to limit national ownership to promote diversity. Thus, even where (as here) the market is competitive and further consolidation is unlikely to create undue concentration of economic power and has the positive effect of enhancing efficiency, the Commission suggests that a cap may nevertheless be justified in order to promote diversity.

Diversity, of course, is an imprecise concept and one which is open to a wide range of completely subjective views. If "diversity" of ownership is important apart from any instrumental significance it might possess, it is not clear why any particular degree of "ownership" is permitted. Indeed, "collective" ownership maximizes diversity of ownership.

But, while a situation where everyone owns the airwaves may be one consistent with maximum diversity of ownership, it may make effective provision of service impossible. The decision to award licenses is, in the first instance, a decision to sacrifice ownership diversity for a utilitarian reasons: Individuals are unlikely to undertake investments in broadcast transmitters and other equipment if they are not guaranteed resource rights that permit delivery of an acceptable signal and afford a reasonable opportunity to earn rewards sufficient for economic viability. Note that in

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[11] (...continued)
market.

In fact, having additional, stronger buyers in the market has served to bid up the rights for syndicated programming. As a result, syndicated programming is currently yielding record-setting levels:

> 'More money has been spent in the last year [on syndicated programming] than has evern been spent before in history,' says Dick Kurlander, vice president and director of programming at Petry TV. 'It looks like there are going to be some records set,' says Worldvision President John Ryan. . . . Carsey-Werner President Joe Zaleski says, 'Programs are generating a lot of dollars. There are more TV stations and buyers in the market than ever before. And our business is much like Economics 101. If there is demand from the buyers and you have the supply and the demand is greater than the supply, the dollars are higher.'

"The funny money is off-net: 'Seinfeld' leads way as broadcasters and cable pony up — and up — for high-profile sitcoms," *Broadcasting & Cable*, February 23, 1998, at 18.

this case the tradeoff can be stated as one between greater diversity of ownership and greater diversity of expression. If everyone owns the airwaves, no one may be capable of using the airwaves to express views effectively.[12] Once it is admitted that some ownership (*i.e.,* control of resource rights) may be useful and necessary to promote delivery of an effective service, the existence of a possible tradeoff is (at least implicitly) conceded. Greater ownership may sacrifice some diversity of ownership, but the sacrifice may be, on net, beneficial to the extent it produces other desirable results (in particular, delivery of an effective service to the public).

However, even if one accepts "maximum diversity of viewpoints" (however one defines it) as a worthy end, the Commission's national ownership caps are still difficult to defend. To begin with, the "relevant market" for assessing diversity in broadcast voices is the local (not national) market. Viewers view those signals that are available to them in a particular community. The question is: to what extent do viewers in local markets have diverse sources of viewpoints, outlets and sources of programming? And: how do *national* ownership rules impact *local* diversity?

The answer to the first question relates to our local market analysis. In each local market, there are other television stations — eleven, on average. Local diversity is not diminished if one — or all — of those stations are bought by group owners. One "voice" may be exchanged for another, but local viewers' options are not reduced.[13] In addition, viewers in each local market are faced with an almost bewildering array of cable services, satellite-delivered programming and, increasingly, Internet video options. As a result, local viewing today is spread among a far greater number of outlets than at any time before.

As to the second question, unless one is prepared to defend the need for national ownership rules by arguing that *local* voices (no matter how marginal) are preferable to national voices *per se*, it is hard to see any correlation between national limits and the diversity available to any individual

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[12] In this regard, we note that CB radio (which was an unlicensed service open to all who purchased a CB radio) was a sort-lived phenomenon.

[13] The Commission itself has recognized this contradiction. In its *Further NPRM*, *op. cit.*, at ¶ 83), the Commission observed: "Relaxing the national ownership limits will not by itself increase or decrease the number of separately owned broadcast TV stations in the video program delivery market. . . . [T]he video program market is a local market."

viewer.[14] The other perfectly plausible explanation for such limits is rooted in a populist concern about large enterprises, although it is difficult to square this rationale with the fact that there are six broadcast networks today (with a seventh, PAX Net, on the way) versus three before the rules were substantially relaxed for the first time in 1985.

In broadcasting, the ability to compete successfully is critically dependent on the ability to deliver competitive programming.[15] The ability to deliver competitive programming requires that an enterprise be able to spread the fixed costs of program production over as broad an audience as possible, while at the same time delivering competitive demographics to advertisers. National advertisers are looking for a national demographic and there is thus pressure to deliver programming to as many local markets as possible.

To produce competitive programming requires large investments in highly risky program production ventures. Large investments can only be justified if there is a reasonable prospect of tapping a large (national/international) audience and thus being able to deliver a large audience to national advertisers seeking to make a national "buy." The ability to achieve broad audience cover-

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[14] The Commission has repeatedly confronted the conflict between its ownership and local service objectives, on the one hand, and the economic imperative for effective widespread distribution of programming to exploit the large economies of scale in program production, on the other. This type of conflict is not unique to broadcasting and characterizes other spectrum uses as well. One of the issues the Commission had to confront in "packaging" the PCS spectrum was the strong economic pressure, driven by the utility of being able to produce a service with a large — ideally, national — footprint of significant benefit to consumers, on the one hand, and the need to afford a variety of different types of players the opportunity to compete for PCS licenses. Economies of broad geographic scale imply that groups of licenses would be more valuable if won by the same bidder than if ownership were disaggregated. One source of cost savings derives from spreading the fixed costs of new systems over a larger customer base. To address the potential desirability of a large footprint, the FCC carefully considered auction designs that would enable efficient assemblages of licences.

Interestingly, one of the measures of the success and efficiency of the Commission's PCS spectrum auctions that was subsequently cited by the Commission and Congressional Budget Office (CBO) was the ability of participants to assemble large blocks of licenses to enable them to supply a consumer-friendly, national service. In its evaluation of the FCC's auctions, CBO stated that an "indicator of efficiency is the success that bidders have in winning groups of licenses that appear economically rational. Pulling together groups of licenses that may allow a producer to provide services at a lower average cost is economically efficient." In evaluating the efficiency of the FCC's PCS auctions, the CBO subsequently noted that: "The result of the A&B block auction that most strongly suggests an efficient distribution of licenses was the success of bidders in aggregating groups of licences. Each of the three largest winning bidders — AT&T, WirelessCo, and PCS PrimeCo — won licenses that enable them to offer nationwide service." *See Where Do We Go From Here? The FCC Auctions and the Future of Radio Spectrum Management* (April 1997), at 18.

[15] For a fuller elaboration of the analysis presented here, *see* John Haring and Harry M. Shooshan III, *Focusing on the "Success Mode": A Case for Deregulating National Broadcast Television Ownership,* February 7, 1997. A copy is provided as Attachment C to this paper.

age turns on the ability to distribute programming in as many local markets as possible. The ability to guarantee the broad audience coverage, which is the *sine qua non* for making the investments in expensive programming needed to be competitive, is obviously of critical importance.[16]

In fact, we can observe that while expanded group ownership has not diminished the number of local voices, it has dramatically improved the quality of those voices. For example, nearly all Fox-owned stations have added extensive local news services to their broadcast schedule. Moreover, Fox was the first network to aim much of its prime time programming at African-American viewers, thereby qualitatively enhancing their viewing options. USA Broadcasting (formerly Silver King) is converting weak UHF stations (in larger markets where they face, on average, 13 competing commercial stations) from home shopping formats to full local service outlets (a format it calls "City Vision"). This conversion has begun with its Miami station and, in this case, with programming developed locally and tailored to local needs, interests and concerns. The same general format will be used in each of its markets, which means that the costs of developing this format can be shared among all its owned stations. Group owners have substantially improved the quality of local programming by using their improved buying power to obtain more recent syndicated shows for their owned stations. In some cases, group owners have affiliated their stations with one of the newly emerging networks (Tribune with WB). Group owners have also used their station groups as the nucleus for starting a new network (*e.g.*, the family-oriented PAX Net).

Doing the Right Thing

We emphasize that these benefits have occurred, in large part, as a result of previous decisions by the Commission to relax its national ownership rules. This leads one to ask whether the rules have imposed real costs (reduced efficiencies, loss of synergies, etc.) in return for only illusory benefits. One problem is that we have never seen how the market would operate in the

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[16] A possible alternative to integration via ownership is to attempt to use contractual arrangements to put together an aggregation of potential audiences sufficient to warrant the needed investments. We address that point in a previous study of this issue. *See ibid.*, at 9 *et seq.* There are two serious economic difficulties with this approach: (1) The transactions costs of putting together such an aggregation are liable to be substantial not only in absolute terms (threatening enterprise viability), but also relative to organization based to a large extent on owned and operated piece parts; and (2) It may prove impossible to structure contractual arrangements in such a way as to ensure adequate incentives for cooperation and effective joint action. The recent increased friction between networks and affiliates over proposals to share the costs of programming suggests that integration via ownership may be increasingly critical in order to maximize efficiency, especially for newer networks.

absence of a national cap. We do, however, have the experience of how the market adjusted to periodic relaxation of the caps. In our view, the NOI is practically devoid of any sign that the Commission has considered that experience. The time has come to shift the burden.[17]

In the face of clear evidence that loosening the rules has produced significant benefits — more networks, stronger local stations with expanded news and local programming and, thereby, greater true diversity (*i.e.*, there is more worth watching), and in the absence of any apparent real harm, the Commission should do the right thing and eliminate the national caps, as it first proposed to do almost 15 years ago.

Eliminating the national cap on television station ownership is also important so that broadcast group owners are not placed at a competitive disadvantage with cable MSOs and so that television networks are not handicapped relative to cable networks. We note that, for the first time, cable networks account for more combined viewing than all six broadcast networks.[18] By limiting efficient combinations of broadcast stations, these rules make it harder for broadcasters to compete effectively with cable entities which already have the advantage of dual revenue streams.

Finally, given the substantial costs that broadcasters are incurring to make the transition to DTV (a transition mandated by the government), it is difficult to understand why the Commission would not want to permit the networks and other group owners to assemble the most efficient "distribution machine" possible. The large, highly risky investments required will only be economically feasible if broadcasters are able to earn a competitive return. We note that the large group owners have been among the leaders in deploying DTV technology, in many cases, committing to beat the FCC-imposed rollout deadlines.

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17 We think that this is what Congress intended when it instructed the Commission to review its rules and to "determine whether any of the rules are necessary in the public interest as the result of competition." See § 202(h).

18 *See* Gary Levin, "Cable Keeps Coming on Strong," *USA Today*, July 17, 1998, at 2E ("Over a two-week period, an average 22.3 million homes watched cable in prime time, while 22.1 million watched the six networks."); and "Changing Channels on the Broadcast," *USA Today*, July 17, at 1E ("Just 20 years ago, ABC, CBS and NBC commanded an astounding 91% of the prime-time audience. . . . Today, the Big Three networks together manage just 47% . . . ."

The UHF Discount

While we see no reasoned basis for retaining any limit on national ownership, we believe that if some cap remains it should continue to embody the so-called "UHF discount." The UHF discount was adopted in 1985 and provides that, for purposes of calculating reach, UHF stations are attributed with 50 percent of the households in their market. The discount was adopted in order to compensate for the handicaps UHF stations have in terms of signal strength and coverage areas relative to VHF stations.

In its NOI, the Commission asks whether the UHF discount should be modified or eliminated in light of expanded cable penetration which presumably eliminates any disparity in signal quality between UHF and VHF stations. Our answer is "no." The discount should be retained.

By incorporating the UHF discount into its audience reach cap, the FCC created an incentive for group owners to acquire more UHF stations. These stations are typically the weakest in the market and benefit the most from the upgrading that has come with group ownership. It is also not surprising that new networks (*e.g.*, UPN) have been formed around a base of group-owned UHF stations. By modifying or eliminating the UHF discount, while retaining an overall cap, the FCC would be undermining these incentives. In our opinion, the UHF discount, coupled with a more liberal national ownership cap and with removal of the fin/syn rules (all of which have encouraged the growth of more networks and enabled other forms of efficient cost sharing), has contributed as much or more to the strengthening of UHF stations as has cable carriage.

Furthermore, over one-third of households do not subscribe to cable.[19] The UHF handicap still exists for these households.[20] The import of these disabilities is that UHF stations have smaller potential audiences than their VHF counterparts, cable connections notwithstanding. The economic implication is "a tougher row to hoe," with tolerances at each successive point in the production chain closer and less tolerant of errors or misfortune. The import of removing the UHF discount will

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[19] In addition, nearly 75 percent of households have more than one television set. *See* Television Bureau of Advertising Website <http:\\www.tvb.org/researchreports/tv_basics/tv_basics5.html>. Many of these additional sets are not connected to cable systems; *i.e.*, rely on over-the-air reception. Thus, significant viewing occurs on "non-wired" sets even when there is a household cable connection. On those sets, a larger proportion of viewing is focused on prime VHF stations which deliver strong signals capable of being picked up with the set's built-in antenna.

[20] *See* Jules Cohen, Engineering Statement, Comparison of VHF and UHF Television Service, MM Docket No. 98-35, July 16, 1998.

likely be manifested in fewer hours of high-quality, original programming that can be economically supported, some sacrifice of production values with a resulting loss of competitiveness, and news and public affairs programming that is less than licensees would wish and citizens deserve.

Moreover, to the extent UHF stations are weakened, viewers in non-cable households and of non-cabled sets are harmed disproportionately (since presumably a higher percentage of their viewing is of these stations than in a cable household or on a cabled set). Especially since the Commission has acknowledged cable's dominant position in the video marketplace and the lack of effective competition, it seems inconceivable that the Commission would take a step that would effectively increase cable's market power.

Summary and Conclusions

In sum, the viability of the business of broadcasting turns on the ability to assemble a sufficiently large block of licenses to reduce operating risks to the point where there is adequate incentive for needed investments to occur. A measure of the significance of the kinds of transactional and production economies we have described is obviously supplied by the widespread and long-standing importance of networking in broadcasting (networks affording a means for spreading the large fixed production costs of programming through contractual means over larger audiences) and by the efforts of a large number of various group owners to take advantage of transactionally more efficient ownership alternatives as the government has afforded this type of opportunity through the modest relaxation of the ownership rules it has heretofore permitted. As we have discussed, there simply is no anti-competitive rationale for assembling a national aggregation of *local* distribution means. The only credible explanation for such behavior is efficiency enhancement — a laudable result which government policy should foster rather than inhibit.

This is certainly an ironic consequence of ownership rules which purportedly are conceived to expand expression and diversity of program outputs. Failure to permit full exploitation of opportunities to economize and deliver more competitive programming is hard to square with these putative objectives.

We recommend, as we have before, that the national ownership cap be removed altogether. As a second best outcome, we suggest that the cap be raised substantially and that the UHF discount be retained without modification.

Appendix

Television Station Data for Selected Owners

Data Provided by BIA Consulting and

Compiled by SPR

(July, 1998)

STRATEGIC
POLICY
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APPENDIX A: 7/20/982:55 PM

TELEVISION STATION DATA FOR SELECTED OWNERS, DATA PROVIDED BY BIA CONSULTING AND COMPILED BY SPR (July, 1998)

OWNER	MARKET NAME	MARKET RANK	CALLS	CHANNEL	CITY OF LICENSE	# UHF STATIONS IN MKT 1997	# VHF STATIONS IN MARKET 1997	# TOTAL COMMERCIAL STATIONS LICENSED TO MARKET 1997
Fox Television Stations Incorporated	Atlanta	10	WAGA-TV	5	Atlanta	7	3	10
Fox Television Stations Incorporated	Austin, TX	60	KTBC-TV	7	Austin	4	2	6
Fox Television Stations Incorporated	Birmingham-Tuscaloosa-Anniston*	51	WBRC-TV	6	Birmingham	9	2	11
Fox Television Stations Incorporated	Boston	6	WFXT	25	Boston	10	4	14
Fox Television Stations Incorporated	Chicago	3	WFLD	32	Chicago	9	4	13
Fox Television Stations Incorporated	Cleveland	13	WJW-TV	8	Cleveland	9	3	12
Fox Television Stations Incorporated	Dallas-Ft. Worth	8	KDFW-TV	4	Dallas	11	4	15
Fox Television Stations Incorporated	Denver	18	KDVR	31	Denver	8	4	12
Fox Television Stations Incorporated	Denver	18	KFCT	22	Ft. Collins	8	4	12
Fox Television Stations Incorporated	Detroit	9	WJBK-TV	2	Detroit	5	3	8
Fox Television Stations Incorporated	Greensboro-High Point-Winston Salem	46	WGHP-TV	8	High Point	4	3	7
Fox Television Stations Incorporated	Houston	11	KRIV	26	Houston	11	3	14
Fox Television Stations Incorporated	Kansas City	31	WDAF-TV	4	Kansas City	5	3	8
Fox Television Stations Incorporated	Los Angeles	2	KTTV	11	Los Angeles	11	7	18
Fox Television Stations Incorporated	Memphis	42	WHBQ-TV	13	Memphis	4	3	7
Fox Television Stations Incorporated	Milwaukee	32	WITI-TV	6	Milwaukee	6	3	9
Fox Television Stations Incorporated	New York	1	WNYW	5	New York	10	6	16
Fox Television Stations Incorporated	Philadelphia	4	WTXF	29	Philadelphia	10	3	13
Fox Television Stations Incorporated	Phoenix	17	KSAZ-TV	10	Phoenix	5	8	13
Fox Television Stations Incorporated	Salt Lake City	36	KSTU	13	Salt Lake City	2	5	7
Fox Television Stations Incorporated	St. Louis	21	KTVI	2	St. Louis	3	4	7
Fox Television Stations Incorporated	Tampa-St Petersburg-Sarasota	15	WTVT	13	Tampa	9	3	12
Fox Television Stations Incorporated	Washington, D.C.	7	WTTG	5	Washington	7	4	11
USA Broadcasting	Atlanta	10	WNGM-TV	34	Athens	7	3	10
USA Broadcasting	Boston	6	WHSH-TV	66	Marlborough	10	4	14
USA Broadcasting	Chicago	3	WEHS-TV	60	Aurora	9	4	13
USA Broadcasting	Cleveland	13	WQHS-TV	61	Cleveland	9	3	12
USA Broadcasting	Dallas-Ft. Worth	8	KHSX-TV	49	Irving	11	4	15
USA Broadcasting	Houston	11	KHSH-TV	67	Alvin	11	3	14
USA Broadcasting	Los Angeles	2	KHSC-TV	46	Ontario	11	7	18
USA Broadcasting	Miami - Ft. Lauderdale	16	WYHS-TV	69	Hollywood	9	5	14
USA Broadcasting	New York	1	WHSE-TV	68	Newark	10	6	16
USA Broadcasting	New York	1	WHSI-TV	67	Smithtown	10	6	16
USA Broadcasting	Orlando-Daytona Beach-Melbourne	22	WBSF	43	Melbourne	9	3	12
USA Broadcasting	Philadelphia	4	WHSP-TV	65	Vineland	10	3	13
USA Broadcasting	Tampa-St Petersburg-Sarasota	15	WBHS-TV	50	Tampa	9	3	12
Average stations per market								**12.06**

* SPR combined these three markets, listed separately by BIA, because Nielsen has advised stations that it intends to collapse the Anniston, Birmingham and Tuscaloosa television markets into a single Birmingham DMA effective during the fourth quarter of this year. As a result, Birmingham will jump from its current rank as the 51st DMA market to the 39th.

Note: SPR removed K13VC, a low-power station, from the BIA listing of Fox-owned stations.

Attachment A

STRATEGIC
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A Numerator in Search of a Denominator

by

John Haring

Harry M. Shooshan III

Prepared for
Fox Broadcasting

May 17, 1995

Introduction

In commenting on the Commission's Multiple Ownership Rules,[1] there is, truth be told, really very little one can say that has not been said several times before. Indeed, in reviewing the Commission's various orders dealing with this topic going back to the late 1930s and early 1940s, one can not help but be struck by the extent to which the same arguments about the rules, both *pro* and *con*, have been made repeatedly from the time of their inception. Our view, and a Commission majority's view in 1984, is that the rules should be abolished because they do not make any sense in today's multichannel, multimedia marketplace. But then they have, at least in our view, barely ever made any sense. Paradoxically, all that has happened as time has passed is that, as the number of competing stations and competing media have grown far beyond the rules' advocates' wildest dreams, *the rules themselves have actually been allowed to become stricter.* How can this view be sustained? Did not the rule of sixes and sevens become the rule of sevens (and fives)? Did not the rule of sevens eventually become the rule of twelves (with a 25-percent "reach" ceiling)? Did not the rule of twelves give way immediately to a rule of fourteens (with a 30-percent reach ceiling), provided at least two of the stations in which an entity holds cognizable interests are minority controlled, this latter extension apparently grounded in the notion that concerns about concentration of ownership are somehow ameliorated by the race of the owners?[2]

Of course the Commission obviously has "relaxed" its rules in these ways. In each case, however, the "relaxed" standards were actually stricter than what would have been permitted had the previously prevailing *relative* (*i.e.*, proportional) standards been allowed to govern permissible limits of ownership.[3] This is doubly ironic because not only is the degree of relative restriction

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1 While we comment briefly on what we regard as the questionable merits of the Commission's in-market ownership regulations, our primary focus in this submission is on the Commission's nationwide ownership caps.

2 At the time this change was adopted, both Commissioners Dawson and Patrick expressed strong misgivings about the Commission's confounding the issues of minority ownership and concentration of ownership. *See* "Separate Statement of Commissioner Mimi Weyforth Dawson Concurring in Part" and "Separate Statement of Commission Dennis R. Patrick Dissenting in Part" in *Amendment of Multiple Ownership Rules* (Gen. Docket 83-1009), 100 FCC 2d 17, 18 (1984).

3 Suppose that when there are 100 stations nationwide, the government says it is okay to own two stations, that is, 2 percent of the total. Suppose that when there are 200, the government says it is okay to own three stations, that is, 1½ percent of the total. This relaxation in absolute restriction actually represents a tightening in relative

(continued...)